WILLIAM H. STILES
PARTNER
wstiles@verrilldana.com
Direct: 207-253-4966

ONE PORTLAND SQUARE
PORTLAND, MAINE 04112-0586
207-774-4000 • FAX 207-774-7499
www.verrilldana.com

September 5, 2008

Mila Kofman, Superintendent
Attn: Vanessa J. Leon
Docket No. INS-08-900
Maine Bureau of Insurance
124 Northern Avenue
Gardiner, ME 04345

In Re: Review of Aggregate Measurable Cost Savings Determined By Dirigo Health For The Fourth Assessment Year
Docket No. INS-08-900

Dear Ms. Leon:

Enclosed for filing please find two (2) copies of the Reply Brief of the Maine State Chamber of Commerce.

Thank you for your attention to this matter. If you have any questions, please feel free to contact me at 774-4000.

Very truly yours,

William H. Stiles

Enclosures
cc: Michael J. Colleran, Esq.
Thomas Sturtevant, Jr., Esq.
James P. Highland, PhD
Mia S. Poliquin Pross, Esq.
Bruce C. Gerrity, Esq.
D. Michael Frink, Esq.
Christopher T. Roach, Esq.

STATE OF MAINE
DEPARTMENT OF PROFESSIONAL AND FINANCIAL REGULATION
BUREAU OF INSURANCE

IN RE:	REVIEW OF AGGREGATE MEASURABLE COST SAVINGS DETERMINED BY DIRIGO HEALTH FOR THE FOURTH ASSESSMENT YEAR	)))))	FILING COVER SHEET

DOCKET NO. INS-08-900

FILING COVER SHEET

To: Mila Kofman, Superintendent of Insurance
Attn: Vanessa J. Leon

Dated Filed: September 5, 2008

Name of Party: Maine State Chamber of Commerce

Document Title Reply Brief of Intervenor Maine State Chamber of Commerce

Document Type: Brief

Confidential: No

Respectfully submitted,

/s/ William H. Stiles
William H. Stiles, Bar No. 8123

VERRILL DANA, LLP
P.O. Box 586
One Portland Square
Portland, Maine 04112-0586
William H. Stiles Direct: (207) 253-4658
Email: wstiles@verrilldana.com
cc: rlefay@verrilldana.com

Phone: (207) 774-4000
Fax: (207) 774-7499

NON-CONFIDENTIAL

STATE OF MAINE
DEPARTMENT OF PROFESSIONAL AND FINANCIAL REGULATION
BUREAU OF INSURANCE

IN RE:	REVIEW OF AGGREGATE MEASURABLE COST SAVINGS DETERMINED BY DIRIGO HEALTH FOR THE FOURTH ASSESSMENT YEAR	)))))	REPLY BRIEF OF MAINE STATE CHAMBER OF COMMERCE

DOCKET NO. INS-08-900

NON-CONFIDENTIAL

STATE OF MAINE
DEPARTMENT OF PROFESSIONAL AND FINANCIAL REGULATION
BUREAU OF INSURANCE

IN RE:	REVIEW OF AGGREGATE	)
	MEASURABLE COST SAVINGS	)
	DETERMINED BY DIRIGO	)
	HEALTH FOR THE FOURTH	)
	ASSESSMENT YEAR	)

DOCKET NO. INS-08-900

TABLE OF CONTENTS

INTRODUCTION

In its principal brief, the Maine State Chamber of Commerce ("Chamber"), along with the other intervenors, identified numerous undisputed factual, methodological and legal deficiencies related to the CMAD, BD/CC, MLR and Overlap savings figures adopted in the Dirigo Health Agency Board's Decision ("Dirigo Decision") Decision. In apparent recognition of its flawed methodologies, the Brief of the Dirigo Board ("Dirigo Brief") spends little time responding to the Chamber's substantive arguments, but instead asks the Superintendent to overlook the flaws in the name of deference. Along the way, the Dirigo Brief mischaracterizes the applicable standard of review and the Superintendent's actions in the prior three proceedings, and then offers only circular logic or unsupported conclusory statements in defense of the Dirigo Decision. Of course, the applicable standard of review is not as relaxed as the Dirigo now suggests. Furthermore, no amount of deference can overcome the factual, methodological and legal deficiencies in the record.[1]

I. THE APPLICABLE STANDARD OF REVIEW DOES NOT RELEGATE THE SUPERINTENDENT'S ROLE TO WIELDING A RUBBER STAMP.

The Superintendent, not the Dirigo Board, is charged with administering the procedure governed by 24-A M.R.S.A. § 6913(1)(C).[2] Although the Dirigo Brief suggests that the Superintendent's role is limited to simply deferring to Dirigo's interpretation[3] of the evidence in

---

[1] For brevity's sake, the Chamber will not repeat all of the arguments presented in the reply brief of Anthem, MeAHP and the Trusts, but hereby incorporates them herein by this reference.

[2] This provision reads, in pertinent part as follows:

> C. Following a public hearing held in accordance with the Maine Administrative Procedure Act … the superintendent shall issue an order approving, in whole or in part, or disapproving the filing made under paragraph B. … The superintendent shall approve the filing upon a determination that the aggregate measurable cost savings filed by the board are reasonably supported by the evidence in the record.

[3] Most, if not all, of the arguments presented in the Dirigo Brief represent the agency's view, which was largely rejected in the Board's Decision.

the record, the plain language of the statute and the Superintendent's prior decisions prove otherwise. Indeed, the plain language of the statute does not require the Superintendent to give deference to Dirigo's determinations, and in fact the Superintendent's Decisions in Years 1, 2 and 3 conclusively demonstrate that the Superintendent has routinely disregarded the Dirigo Board's interpretation of the evidence in the record, and has always provided the type of independent, meaningful review the Legislature intended when it amended the statute in 2005 to add the current proceeding.[4]

II. THE DIRIGO BRIEF'S INTERPRETATION OF THE EVIDENCE FINDS NO SUPPORT IN THE DIRIGO BOARD'S DECISION, PAST SUPERINTENDENT'S DECISIONS, OR COMMON SENSE.

In light of the substantive arguments contained in the Dirigo Brief, it is not surprising that Dirigo hopes to relegate the Superintendent's role to pressing a rubber stamp. Faced with undisputed evidence that their methodologies' lack reliability, the Dirigo Brief offers only circular logic, inconsistent interpretations, and unfounded conclusory statements of reasonableness. It even contradicts clear findings set forth in the Dirigo Decision.

A. The Dirigo Brief's Illogical Logic.

The Dirigo Brief suggests that the $119.4 million of CMAD savings "is supported both by empirical evidence and statistical evidence in the record." Dirigo Brief, p. 5. The Dirigo Brief explains that empirical evidence consists of the (1) "historical record of CMAD savings from years 1 through 3," (2) "reports" by some hospitals[5], and (3) "non-statistical evidence"[6] of

---

[4] The Superintendent's hearing was not a part of the original statute, but was added during the 2005 amendment of the Dirigo Health Act. See P.L. 2005, ch. 400, Part A, Section 10. If, as suggested by Dirigo, the Superintendent's role is the same as a reviewing court, the amendment would be mere surplusage.

[5] These so-called "reports" are actually newspaper articles written by some hospital representatives that make reference to the prior decisions of the Superintendent. Certainly, none of these articles suggest that there was more "savings" than the amounts determined by the Superintendent. The only specific number identified comes from Elizabeth Mitchell's statement that MMC -- with no mention of the other MaineHealth affiliates -- has saved $40 million over three years (or an average of $13.3 million a year). The Dirigo Brief's reliance on these reports is

lower cost growth in 2004- 2007 as compared to 2000-2003. Dirigo Brief, p. 5. The statistical evidence supposedly includes the US Model, Cluster 1 and Cluster 2, although the Dirigo Decision specifically rejected any reliance on the Cluster Models. Id.

The Dirigo Brief makes a similar argument with respect to BD/CC. The "empirical and statistical evidence" identified by the Dirigo Brief is (1) "historical evidence of approved savings in each of the prior years"; (2) a "dramatic drop in Maine's uninsurance rate as compared to other states"; and (3) the "results of three regression analyses performed by Dr. Thorpe, which show savings ranging from approximately $17 million to $42 million." Dirigo Brief, p. 15. Again, however, the Dirigo Decision specifically rejected any reliance on two of the three Models.

The logic proposed by the Dirigo Brief may be summarized as follows: (1) there must be CMAD and BD/CC savings because the Superintendent has found savings in past years; (2) the CMAD savings must be at least as high as the lowest number identified by a regression model in the record[7]; (3) a regression model is inherently reliable because the Superintendent said to use one for CMAD; and (4) the three regression models proposed by Dirigo for each savings

---

misplaced for two reasons. First, the statements simply referred to decisions of the Superintendent, or in MMC's case referred to compliance with the voluntary COM limit -- not the CMAD limit (Dirigo has neglected to include COM as a savings initiative in Year 4). Second, as Dirigo concedes, "MMC represents approximately 20% of hospital discharges in Maine for 2007." **AR 2, Tab 82, p. 8, ln 183 - 187.** There is no other statement of specific savings from other hospitals, and in fact although the author of the excerpted article works for MaineHealth (which consists of numerous hospital affiliates), the article only identifies savings for MMC and identifies none for its affiliates. Even assuming all hospitals in the State had similar experiences to MMC -- again there is zero support for this assumption in the record as the article does not even indicate that all MaineHealth hospitals experienced savings -- this evidence suggests that at most the savings figure could be $66.5 million (one-third of $40 million times 5). Of course, such an amount would represent only an upper bound subject to the adjustments required by past decisions of the Superintendent.

[6] It is not clear why the Dirigo Brief suggests that a comparison of average growth rates between two periods is not a statistical analysis.

[7] The Dirigo Brief makes this leap notwithstanding the models' lack of proper specification and statistical significance, the incorporation of discredited assumptions, and the admitted failure to follow the applicable law or the Superintendent's decisions from prior years.

initiative may be relied upon without question, notwithstanding the Dirigo consultant's own assessments of models' credibility, the Models' failure to achieve well established rules of statistical significance, the accuracy of the underlying data, and the results of numerous other reasonableness tests. Indeed, the Dirigo Brief appears to suggest that the CMAD regression models are reliable because, taken together, the biased Cluster Models (that were assigned little or no credibility and were specifically rejected by the Board) somehow resolve the admittedly inclusive output of the US Model. In other words, unless the prior decisions of the Superintendent are used to prop up the admittedly inconclusive CMAD US Model and the "presented but never discussed" Maine BD/CC Model (to which the Dirigo Consultants assigned zero credibility and for which no statistical significance test measures have been provided[8]), the Dirigo Brief's house of cards must fall.

Interestingly, although the Dirigo Brief heralds the Superintendent's prior decisions as proof that some savings must exist in Year 4, it flees from these same decisions later in its Brief, arguing that the prior decisions are not relevant to the reasonableness of the amount of the Year 4 savings. Dirigo Brief, p. 7, 16. Apparently, this is because (with respect to CMAD) Dirigo has created a "new, more accurate, methodology" and added "an additional year of data." Dirigo Brief, p. 7. Similarly, the Dirigo Brief casually dismisses any criticism of a four fold increase in BD/CC savings because "the reason for the difference is understood" [referring to the adoption of a new methodology]. Dirigo Brief, p. 16. In other words, the Dirigo Brief suggests that the

[8] Although the Dirigo Brief correctly states that the regression output for the BD/CC regression models are buried within DHA 3, these output results do not contain the types of statistical significance measures provided for the review and consideration for the CMAD issue. This is important because, even assuming that one could use the information provided to determine the necessary significance levels from the information provided, it is clear that the Dirigo Board does not have such capabilities. More importantly, the subject of statistical significance was not even raised during deliberations.

adoption of a new methodology with another year of data completely eliminates the need for comparison of results from year to year.

This line of argument was addressed in Year 3, with the Superintendent finding that

> One final test of reasonableness of this result is that it is not inconsistent with the $5.5 million [of BD/CC savings] found reasonably supported in Year 2, when adjusted for growth in enrollment during the intervening year and for the addition of a new category of savings within the initiative.

Superintendent's Year 3 Decision, p. 18. The Year 3 BD/CC methodology was a new methodology with an additional year of data. Thus, even assuming that the Superintendent decides to accept Dirigo's faulty logic that questionable regression models may be propped up by prior decisions of the Superintendent, these same decisions must be used by the Superintendent to test the reasonableness of the regression model projections.

Accordingly, the Superintendent must reject the CMAD and BD/CC savings amounts. The fact that the regression models produce more than four-and-a-half times the amount deemed reasonably supported for these initiatives in Year 3 demonstrates that the regression models are unreasonable.

B. A Few Brief Responses To Curious Arguments in the Dirigo Brief.

The Chamber's principal brief addresses in great detail the various reasons that the $149.6 million of AMCS must be rejected as not reasonably supported by the evidence in the record. However, the Dirigo Brief makes a few arguments that warrant a brief reply.

- *Dirigo Brief, p. 5: "The Superintendent was concerned that the methodology used in the first three years depended upon projections that were based on Maine pre-Dirigo data alone, which would become less reliable with the passage of time."*

The Dirigo Brief suggests that the Superintendent's "passage of time" concern, that is, the spread between the base period and the measured time period, is somehow limited to only the

passage of time in Maine. Although Mr. Schramm testified that he's "fairly certain time passes outside of Maine as well as inside Maine," (**AR 2, Tab 60, p. 105, ln 13- 15**), the Dirigo regression models preserved the very same 2000-2003 base period that the Superintendent deemed "tenuous." This is problematic given the Superintendent's concern that

> That connection becomes more tenuous each year due to the combination of the passage of time and the CMAD methodology's lack of control for factors unrelated to Dirigo. Time both diminishes the relevance of the available pre-Dirigo historical data and assigns an increasingly disproportionate dollar value to small variations in the trend rate chosen to project forward from 2003. (Superintendent's Year 3 Decision, p. 9)

This language indicates a clear concern with the projection of a base period cost trend from 2000-2003 to 2006, and nowhere does the Superintendent state that this concern is limited to Maine. Dirigo has admittedly preserved the same base period (as represented by the so-called "Dirigo" variable), and has made matters worse by projecting it forward yet another year. More disturbingly, the problematic Dirigo data turbo-charged this already "tenuous" base period by inappropriately increasing Maine's 2000/2001 growth rate from 4.65% (Year 3) to 11.26% (Year 4). **AR 4, Tab 90.** This is not evidence that the CMAD methodology is reasonable. Instead, it is conclusive proof that the "tenuous connection cited in the Superintendent's Year 2 Decision between historic and current cost per CMAD is a basic characteristic" of the Year 4 methodology. Superintendent's Year 3 Decision, p. 9. What was unreasonable in Year 3 cannot be made reasonable in Year 4 by the passage of even more time and the addition of variables that do not remotely achieve statistical signficance.

- *Dirigo Brief, p. 8: "A failure to meet customary standards of statistical significance does not mean that the U.S. model output must be rejected."*

Apparently, in Dirigo's view, a multivariate regression analysis is fail-proof, and the Superintendent should simply adopt the model's savings output -- even if the same model's output proves that the savings projection is "inconclusive" and <u>all experts agree</u>. In essence,

Dirigo's circular logic suggests that a multivariate regression analysis is reliable simply because it is a multivariate regression analysis. If that was the case, the universally accepted and applied concepts of statistical significance testing would never have been created.

The DHA offers several half-hearted reasons why the admittedly "customary" standard of statistical significance should be completely disregarded, but offers not a single citation from a court that has made such a finding. The single case cited in the Dirigo Brief, Kadas v. MCI Systemhouse Corp., 255 F.3d 359, 362 (7th Cir. 2001), did not even address multivariate regression analysis, but rather a simple statistical projection based upon the entire universe of employees that the court rejected (as a matter of law) because the statistical significance indicated a 59% chance of randomness. Id. at 361.[9] Simply put, Dirigo has not cited a single authority which suggests that a .8916 significance level -- an 89% likelihood of randomness -- has been held to be reasonable evidence. Certainly, if there was such a case, Dirigo's counsel would have cited it.

A multivariate regression model with a significance level of .8916, or an 89% likelihood of randomness, cannot provide "reasonable support" for Dirigo's conclusion that there was $119.4 million of CMAD savings.[10]

---

[9] Furthermore, the language cited by Dirigo is at best dicta and not binding even in the 7th Circuit. It fell within a section of the opinion that does not discuss the actual facts of the case, and simply represents a panel's unsolicited thoughts. Id. at 361 (the court merely stated that "we wish to make three observations about the record, *for such bearing as they may have* on future discrimination cases" (emphasis added)). Indeed, the statement paraphrased by Dirigo in fact acknowledges that "some cases have suggested that statistical evidence is not admissible to show discrimination unless it is significant at the conventional 5 percent significance level." Id. at 362, and the Chamber's pre-hearing brief (which the Chamber incorporates herein by this reference) cites to many other authorities, including the U.S. Supreme Court, which have rejected significance levels falling below this standard.

[10] The Dirigo Brief suggests that "[i]ntervenors in essence are arguing that the lack of customary statistical significance means that there is no CMAD savings." DHA Brief, p. 9. The Chamber has certainly presented evidence that indicates that there is no CMAD savings. **AR 4, Tab 84**. What is clear is that the $119.4 million adopted by the Board is not reasonably supported by the evidence.

- *Dirigo Brief, p. 9: "Third, the U.S. model is not based on a sample of hospitals ... It is based on essentially the entire population of U.S. hospitals. As Dr. Thorpe testified, statistical significance in not an issue in this context."*

The section of Dr. Thorpe's testimony which the Dirigo Brief offense offered as support for the inapplicability of statistical significance testing to the U.S. Model was elicited during the BD/CC portion of the hearing and cannot be used to support a CMAD argument. It reads as follows:

> MR. COLLERAN: You also used different data?
>
> DR. THORPE: We used different data. The difference here is that these are samples from the current population survey. The CPS data are about 60,000 observations a year that are nationally representative of the U.S. The CMAD data were different, and that is a population. We have 99.8 percent of all hospitals in a CMAD data set. So that is a population estimate. And we had a large discussion about significance and so on which I think is beside the point because that's a population estimate. We have the whole population of Maine. So those issues of interference really don't apply in a population estimate, but they do apply in my bad debt and charity care estimate because it's a sample of the U.S. population.

AR 3, Tab 61, p. 268, ln 3 - 18.

Nowhere in this passage does Dr. Thorpe say that the US Model is somehow exempt from the accepted standards of significance testing. When discussing the US Model in his pre-filed testimony, Dr. Thorpe did state that "[t]he US hospital model is not based upon a sample. It uses the complete universe of hospital experience in the US during the time periods in question (approximately 40,000 observations and so will have excellent predictive power for CMAD trend in the absence of Dirigo." **AR 4, Tab, 83, p. 6, ln 138-141.** However, despite this suggestion of strong predictive powers, the same pre-filed testimony nowhere states that the concept of significance testing is "beside the point." In fact, Dr. Thorpe's pre-filed testimony later states that "there is a 45% chance that the [US Model] savings are directly due to Dirigo" and he concedes that the US Model is "inconclusive as to whether [the post-Dirigo time period]

reduction can be attributable to Dirigo." **Id. at p. 7, ln 147 - 155.** Significantly, he does not state that the Dirigo Board may ignore statistical significance.

Dirigo's argument that statistical significance is unnecessary with respect to the US Model must fail. The Dirigo Brief has clearly taken great liberties in characterizing Dr. Thorpe's BD/CC testimony. Indeed, if he meant what the Dirigo Brief said he meant, Dr. Thorpe would have clearly stated this theory in his pre-filed testimony instead of conceding the "inconclusive" nature of the US Model.[11]

- *Dirigo Brief, p. 9: "Fourth, contrary to how it has been described in these proceeding, including, unfortunately, in Dirigo filings, the 'M:D:Y' variable in the U.S. model does not have a p-value indicating a 45% chance that the null hypothesis can be rejected. Rather, the p-value of .45 indicates a 55% likelihood that the null hypothesis can be rejects - or 1 minus the p-value.*

Notwithstanding the unanimous testimony of all experts, and in particular Dirigo's, that there is only a 45% chance that the US Model savings are $119.4 million and related to Dirigo (the 2000-2003 v. 2004-2007 time trend), the Dirigo Brief now suggests that there is actually a 55% chance that the savings are real and in the amount projected. The Dirigo Brief then concludes, without citation to any legal or econometric authority, that because this likelihood exceeds the "more likely than not" standard, the US Model is reasonably supported by the evidence. Id. at p. 10.

There are two problems with this argument. First, it confuses the concepts of statistical significance (by conventional standards, a 55% chance that the results are not different from 0) with the standard of proof. Second, this argument relies upon application of the one-tailed test. If a one-tailed test is applied, the results will always be greater than 50% significant as measured

[11] At best, including almost the entire universe of hospital cost data may be evidence that the CMAD values used in the multivariate regression analysis are not based upon a sample. However, this argument does nothing to explain (as the US Model attempts to do) why there is a marked year to year variation in growth rates among the hospitals in the United States.

by Dirigo. Indeed, using Dirigo's new and unsupported theory for statistical significance, a model that produced a significance level of .9999 -- indicating certain randomness -- would produce a p-value for the one-tailed test of .49995 (.9999 / 2). According the Dirigo Brief, this would indicate a 50.005% (1 - .49995) chance that the effect is due to Dirigo. Therefore, any and all regression analyses would pass muster under Dirigo's suggested significance testing theory and standard of proof. It would be impossible to find otherwise.

While this theory is certainly consistent with the Dirigo Brief's illogical logic and proposed rubber stamp review, the Chamber contends that such an approach must fail under the true standard of "reasonably supported by the evidence in the record."

- *Dirigo Brief, p. 11: "The COM issue is one of recoverability. In year 3, faced with a Board decision that was inconsistent on whether recoverability of savings should be considered, the Superintendent reduced the amount of savings approved to account for SOP payers' inability to recoup saving from unprofitable hospitals…. This year, however, as discussed above, the Board was clear in its legal determination that recoverability is not an issue at this stage of the statutory process."*

Dirigo's argument is troubling for several reasons. First, the Dirigo Brief brazenly suggests that the agency can change (and admits that it has changed) the definition of AMCS from year to year without legislation or rule-making. In other words, AMCS can mean whatever Dirigo wants it to mean, without regard to consistency. And, according to Dirigo, there is nothing that the Superintendent can do about it.

Second, the Dirigo Brief again takes substantial liberties with the Superintendent's decisions which are contrary to the decisions' plain language. Last year, the Superintendent observed that "the Board treated the issue of whether savings are recoverable differently for physician fees than it did for hospital savings, and differently than it did in the prior years'

proceedings. Superintendent's Year 3 Decision, p. 10. Thus, the Superintendent's concern was not simply inconsistency within Year 3, but also consistency from year-to-year.

Third, although Dirigo suggests that "the Board was clear in its legal determination that recoverability is not an issue at this stage," Dirigo Brief, p. 11, the Board was not as clear as Dirigo's counsel suggests. The CMAD methodology incorporates a cost based reimbursement reduction designed to address the impossibility of recovering of cost savings associated with hospitals reimbursed on a reasonable cost basis. Dirigo Brief, p. 12. So the Dirigo Decision necessarily incorporates the concept of "recoverability" into its so-called legal definition of AMCS, and the Superintendent is free to consider other recoverability-related issues.

Finally, COM is not simply an issue of recoverability. It is an alternative to Dirigo's theory that all reductions in cost growth must be due to Dirigo. Indeed, as documented in the record, several hospitals publicized their attempts to cuts costs when faced by a low operating margin or other non-Dirigo related factors. **AR 5, Tab 95(H)**. Furthermore, COM is a simple reasonableness check. The DHA's regression models suggest a minimum of $119.4 million of CMAD savings -- a number that exceeds the operating margin for all Maine hospitals combined. There is no evidence in the record that hospitals have passed $119.4 million to payers, and the historical COM figures demonstrate that hospitals generally used any "cost savings" to impose their bottom lines as contemplated by the Dirigo 3% voluntary COM limit (but certainly not enough to pay $119.4 million without resulting in insolvency). Thus, the COM evidence is also additional evidence (beyond the admitted lack of statistical significance and cluster bias) that the regression models are not reliable.

- *Dirigo Brief, p. 12: "In any event, there is no credible evidence in the record that there have been overall MaineCare reimbursement cuts, and in fact the evidence shows an overall increase in reimbursement."*

In prior years, it has been established through testimony from the intervenors and even Dirigo's MaineCare witness, Mr. Greene, that there were substantial MaineCare cuts. Superintendent's Year 3 Decision, p. 14 - 15. Although Dirigo now suggests that the cuts were not real or that they were replaced with MaineCare payment increases, these arguments were raised -- and flatly rejected -- by the Superintendent last year. Id. at 15 ("Dirigo asserts testimony this year and last year shows that payment cuts were offset by payment increases … Testimony from the same portion of the hearing …, however, indicates that the payment increases cited by Dirigo have already been attributed to the Dirigo initiative in prior years' proceedings."). Despite losing this argument twice, and offering no new testimony from a MaineCare representative, Dirigo recycles it once again. However, the argument again is based upon the same estimated MaineCare gross payment amounts that do not take into account increased MaineCare membership and utilization, or the MaineCare tax and match program (which requires Maine hospitals to pay a $50 million plus tax in order to restore part of the MaineCare cuts at a net loss to the hospitals). This argument must fail once again.

Significantly, the Dirigo Brief concedes that MaineCare reimbursement cuts and outpatient utilization, key concerns identified by the Superintendent in past proceedings, were ignored because they were "indeterminate." Dirgo Brief, p. 11-12. However, the Dirigo experts did not, through their so-called "more accurate" analysis, even try to quantify the potential impacts, arguing -- just as they did when a multivariate regression analysis was suggested in Year 1 -- that it would be impossible.

- *Dirigo Brief, p. 14: "Although some of the formula's terms vary from those in the statute, it is the same formula used by Dirigo in prior years (which resulted in CMAD savings approved by the Superintendent) and it is the formula used by the hospitals in voluntarily restraining their cost."*

It is not clear from the Dirigo Brief (1) whether Dirigo believes that it can base the CMAD savings on the statute's voluntary limit, but then completely disregard the plain language of the statute, or (2) whether Dirigo has confused the CMAD "formula" (which divides certain cost data by certain volume data) with the "cost data element" that are inputted into the formula. Both alternatives are addressed below.

Assuming that the Dirigo Brief is suggesting it may disregard the plain language of the statute, the Superintendent surely has the authority to reject a methodology for failing to comply with the law. Otherwise, CMAD savings could be anything. Additionally, the Superintendent may, as was done in the past, take Dirigo to task for presenting inconsistent interpretations of AMCS (as it did with the recoverability issue).

Although the Dirigo Brief suggests that Dirigo used the same formula this year as they have in the past, Mr. Schramm's testimony is to the contrary. In fact, Mr. Schramm candidly admitted that "methodology is different for Year 4 as opposed to the Year 3. Because we've moved to including a national data set, we cannot go through and do all the adjustments to the data that we have done in the past removing certain line items through the Medicare cost report." **AR 2, Tab 60, p. 157, ln 20 - p. 158, ln 1.** In other words, in prior years, Dirigo removed certain cost data elements identified in the statute (e.g. hospital based physician, hospital tax, etc.), but this year it did not. Because Dirigo's failure to make the statutorily mandated adjustment appear to be one explanation[12] for the material change in the Maine CMAD values from Year 3 to Year 4 -- which resulted in materially higher base period cost growth -- the Superintendent must reject the CMAD savings as not reasonably supported by the evidence or

[12] The only other explanation is faulty calculations made when srHS manipulated the AHD data to conform it to the Maine SFY and to calculate the various percentages and other variable used in the regression analysis. Again, srHS, not AHD, performed these calculations (**AR 2, Tab 60, p. 148, ln 7 - 23**), and Mr. Schramm testified that the sample audit of the AHD data (using hard copies of Medicare Cost Report) showed no errors. **AR 2, Tab 60, p. 135, ln 3 - 11.**

the applicable law. Indeed, there is no evidence in the record to indicate that Maine hospitals used this "new methodology" rather than the clear definition set forth in the statute.

- *Dirigo Brief, p. 14: "Medicare Cost Reports are not perfect. Given the amount of reports involved here, it is inevitable that some reports will contain errors."*

The Chamber has not suggested that there is anything wrong with Medicare cost reports, and there is no evidence in the record that the Medicare cost report data were inaccurate. Indeed, Mr. Schramm testified that no problems with the AHD data were noted following an audit that compared the AHD data file to a sample of actual Medicare cost reports. **AR 2, Tab 60, p. 135, ln 3 - 11.**

What the Chamber has challenged -- and the Dirigo Brief neglects to address -- is the accuracy of the srHS manipulations of the AHD data. Indeed, these manipulations produced many documented implausible values, including (for example) more than 100% Medicare days. Although the Dirigo Brief suggests that "Dirigo Health's expert made adjustments for data error identified by the Intervenors," Dirigo Brief, p. 14, Mr. Schramm clearly testified that they did not adjust for them all. Worse yet, for the 692 adjustments (out of thousands identified), srHS simply truncated the values without investigating the source of the error or determining the true value. Given Dirigo's lackadaisical approach to data and following clear statutory definitions, it is not surprising that the pre-Dirigo base period changed so much from Year 3 to Year 4, driving the savings projection to over four-and-a-half times what the Superintendent found to be reasonably supported in Year 3.

C. <u>The Dirigo Savings Methodologies Rely Upon Discredited Assumptions.</u>

A even the most cursory review of the Dirigo Brief demonstrates that any and all reductions projected using the "tenuous" base periods are assumed to be the result of the Dirigo Health Act. This assumption has been prominent in Dirigo's CMAD and BC/CC methodologies

since Year 1. The evidence in the record this year clearly dispels this assumption, as explained more fully below.

With respect to CMAD, Dirigo argues that because the Superintendent found that the historical projection methodology showed CMAD savings in prior years, there must be savings in Year 4. However, the historical projection methodology underlying the prior decisions shows that actual CMAD falls below the historical projection in 39 of 50 states[13] (**AR 4, Tab 87**). Even the allegedly "new, more accurate" methodology -- which the Dirigo Brief now suggests in merely a national average (Dirigo Brief, p. 13-14) -- shows savings in 29 of 50 states (**AR 4, Tab 88**). Thus, the fact that the same phenomena occurred in Maine cannot be proof of Dirigo savings. This is evidence that powerful forces not captured by the new regression methodology cause CMAD growth rates to fluctuate wildly from year to year. Indeed, in Maine's pre-Dirigo period, the rates fluctuated between approximately 11%, 9% and 3% with no influence whatsoever from Dirigo (because it did not exist). In order to approve the Dirigo CMAD methodology, the Superintendent must not only assume that all changes in trend are caused by Dirigo, but also that the same forces that caused CMAD growth rates to fall from approximately 11% to 3% before Dirigo existed magically evaporated upon Dirigo's enactment. Such an assumption is not reasonable, and cannot be used to support the $119.4 million of CMAD savings.

With respect to BD/CC, Dirigo apparently assumes that the Dirigo Health Act can be the only explanation for the "dramatic drop in Maine's uninsurance rate as compared to other states." Dirigo Brief, p. 15. However, the evidence in the record clearly demonstrates that

[13] It is unclear how Dirigo's national average explanation furthers its cause. In any event, if it truly is a national average, then 25 states (not 21) would be above the projection and 25 (not 29) would be below. If the expectation is that 25 states would always be below the projection, the fact that Maine is one of these 25 states would appear to have no meaningful import.

Maine's uninsurance rate was falling dramatically prior to the implementation of any Dirigo Health Act reforms (**AR 4, Tab 84, p. 39**), and that this dramatic drop was fueled by a pre-Dirigo MaineCare waiver program that covered nearly 26,000 people by SFY 2004 (**AR 4, Tab 64, p. 60**). Of course, Dirigo would have the Superintendent assume that any forces leading to a dramatic pre-Dirigo drop would magically disappear upon the enactment of the Dirigo Health Act. The record demonstrates that this assumption cannot be true, and cannot be used to support the $23.6 million of BD/CC savings.

D. What the Dirigo Brief Does Not Say Speaks Volumes.

While the Dirigo Brief is filled with curious logic, pleas for a low standard of proof, admissions of inconsistency and brazen disregard for the plain language of the statute, perhaps the most telling statement is one that the Dirigo Brief never makes. Despite significant testimony and argument regarding the effect of volume (case mix adjusted and outpatient equivalent discharges) on CMAD, the Dirigo Brief stays silent. The silence speaks volumes.

The Dirigo Brief neglects to address volume notwithstanding (1) Dr. Dobson's common sense and industry accepted concern that increased volume may drive down cost per CMAD, yet drive up projected savings. **AR 4, Tab 84, p. 36-37**; (2) Dr. Thorpe's article explaining the importance of understanding the effect of forecasted volume on hospital costs, **AR 5, Tab 96(B);** and (3) the summary of srHS Year 3 and Year 4 Total Hospital Costs, CMAD and Discharges which shows an actual decline in volume (driving up CMAD values) in 2000/2001 followed by relatively significant increases in volume for 2003-2006 (driving down CMAD values). **AR 5, Tab 95(F).**

Although volume is included in the CMAD calculation (total costs divided by total volume), the year-to-year variations in volume are not controlled for in the regression models --

even though these year-to-year variations help explain the why the CMAD cost growth varies from one year to the next.[14] The failure to address volume is just another reason to reject the Dirigo CMAD methodology. It allows volume increases to reduce CMAD growth and then multiplies this "savings" by the same increased volume.

CONCLUSION

For the reasons set forth above and in the Chamber's principal brief, the CMAD savings projected by the US Model is not reasonably supported by the evidence, and any alternative measure of CMAD would be subsumed in Dirigo's new BD/CC methodology if adopted. The only BD/CC savings reasonably supported by the evidence is the methodology presented by MeAHP witness Mr. Burke. For the reasons set forth in the Chamber's principal brief, the MLR savings must be rejected, and an appropriate overlap offset must be made to the extent that both CMAD and BD/CC savings are found reasonably supported by the evidence.

Dated: September 5, 2008.

Respectfully submitted,

/s/ William H. Stiles
William H. Stiles (Bar No. 8123)
Counsel for the Maine State Chamber of Commerce

VERRILL DANA, LLP
P.O. Box 586
One Portland Square
Portland, Maine 04112-0586
William H. Stiles Direct: (207) 253-4658
Email: wstiles@verrilldana.com
cc: rlefay@verrilldana.com
Phone: (207) 774-4000
Fax: (207) 774-7499

[14] Newly insured Dirigo Choice members and Dirigo-related MaineCare expansion members cannot explain the increased volume. The increased volume trend began before 2005 when these programs became effective. Furthermore, consistent with Dirigo's previous BD/CC methodologies, these previously uninsured people were contributing to Maine Hospitals' bad debt and charity care costs, and therefore it must be assumed that they were already utilizing hospital services.

CERTIFICATE OF SERVICE

I, William H. Stiles, hereby certify that a copy of the Reply Brief of the Maine State Chamber of Commerce was served on each of the persons listed below in the manner described in the Superintendent's Order Setting Actual Hearing Date, Ruling on Interventions, and Establishing Procedures dated August 18, 2008:

Mila Kofman, Superintendent
Attn: Vanessa J. Leon
Docket No. INS-08-900
Maine Bureau of Insurance
34 State House Station
Augusta, ME 04333-0053

Thomas Sturtevant, Jr., Esq.
Assistant Attorney General
Office of the Attorney General
6 State House Station
Augusta, ME 04333-0006
Tom.Sturtevant@maine.gov

Compass Health Analytics, Inc.
Attn: James P. Highland, PhD
477 Congress Street, 7th Floor
Portland, Maine 04101
jh@compass-inc.com

Michael Colleran, Esq.
Office of the Attorney General
6 State House Station
Augusta, ME 04333-0006
Counsel for Dirigo Health Agency
Michael.colleran@maine.gov

Christopher T. Roach, Esq.
Pierce Atwood, LLP
One Monument Square
Portland, Maine 04101
croach@pierceatwood.com

Roy T. Pierce, Esq.
Preti Flaherty Beliveau & Pachios, LLP
P.O. Box 1058
45 Memorial Circle
Augusta, ME 04332-1058
rpierce@preti.com

Mia S. Poliquin Pross, Esq.
Consumers for Affordable Health Care
P.O. Box 2490
39 Green Street
Augusta, ME 04338-2490
mpross@mainecahc.org

D. Michael Frink, Esq.
Curtis Thaxter Broder Stevens & Micoleau, LLC
One Canal Plaza
P.O. Box 7320
Portland, ME 04112-7320
mfrink@curtisthaxter.com

/s/ William H. Stiles
William H. Stiles, Esq. (Bar No. 8123)

VERRILL DANA, LLAP
One Portland Square
P.O. Box 586
Portland, ME 04112-0586
(207) 774-4000